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No. 90-287

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1990

J. REED DUNKLEY, and GRACE DUNKLEY, husband and wife,

Petitioners,

v.

REGA PROPERTIES, LTD., et. al.

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION

Counsel of Record for
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I.

QUESTIONS PRESENTED FOR REVIEW

Respondent does not cross appeal, and therefore presents no questions to the Court for review. However, the Petition for Certiorari necessarily raises questions which must be addressed at this point in the proceedings. These questions are:

1. Where the appellate court has declined to consider an appeal of an interlocutory order based upon jurisdictional grounds under 28 USC 158(d), should the Supreme Court hear an appeal on the merits of that interlocutory order?
2. Should the Supreme Court consider questions not squarely placed before the lower court?

II.

LIST OF PARENT COMPANIES AND SUBSIDIARIES FOR REGA PROPERTIES, LTD.

PARENTS:

SUBSIDIARIES: Rega Properties, Ltd. and Rhea Farms Ltd., are family corporations. They are solely owned by the Wonnacutt family and have no parents or subsidiaries within the meaning of Rule 29.1.

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For ease of reference, this brief will refer to opinions as reproduced in the Appendix to the Petition for Certiorari. Page numbers will correspond to those used therein.

VI.

SUPREME COURT JURISDICTION

The Supreme Court does not have jurisdiction to hear this appeal under 28 USC 1254. The decision below was not a final decision of the bankruptcy court and therefore the case was not "in" the appellate court within the meaning of 28 USC § 1254. U.S. v. Nixon 418 U.S. 683, 41 L.Ed 2d 1039, 94 S.Ct. 3090 (1974). The Ninth Circuit Court of Appeals properly determined that it did not have jurisdiction to hear the appeal on the

issue of the motion to dismiss because the refusal to dismiss was not a final decision of the bankruptcy court as required under 28 USC 158(d).

VII.

STATUTES AND RULES

The bankruptcy code sections and the bankruptcy rule cited by Petitioner are not relevant to a determination of this appeal. The sole issue that might properly be before the Court is whether the Ninth Circuit Court of Appeals correctly determined that it had no jurisdiction to review the bankruptcy court's refusal to dismiss the action. That question has not been raised by appellant.

The statutes involved in the determination of this Court's jurisdiction are 28 USC § 158(a)&(d) and

28 USC §1254, the relevant portions of which are reprinted below.

§158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title [28 USCS § 157]

. . .

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ...

VIII.

STATEMENT OF THE CASE

Respondent believes that Petitioner has made numerous misstatements of fact and law in the Petition For Writ of Certiorari. These misstatements include:

1. At page 2, Petitioner incorrectly states: "The Ninth Circuit has decided an important question concerning jurisdiction of the Bankruptcy Court...." In fact, the Ninth Circuit Court of Appeals opinion dealt with its <u>own</u> jurisdiction to consider the appeal before it. The court ruled that under 28 USC 158(d),

> "the bankruptcy court's order denying Dunkley's motion to dismiss for bad faith filing is not a final order, and thus this court does not have jurisdiction over Dunkley's appeal of that portion of the district court's order which

affirmed such denial."

Appendix to Petition, page 8.

2. The factual questions extensively argued throughout the Petition are not before the Court. The transfers of property and other business transactions in Canada which are described in pages 6-7 were thoroughly reviewed in evidentiary hearings before the bankruptcy court and were subsequently reviewed in the district court upon the record of the bankruptcy court. Similarly, Petitioner's factual arguments regarding bad faith, at p. 18 and pp. 27-36, were fully considered and decided adversely on the record below. The trial judge and the district court judge were satisfied that there was no substantial

evidence of bad faith, fraud, abuse or mismanagement. See opinion of District Court Judge McNichols, Appendix page 21-22 and his extended quotation from the decision of the Bankruptcy Judge at Appendix pages 19-20.

3. Petitioner incorrectly states at page 12, that the Ninth Circuit indicated that the question presented was whether the bankruptcy court should "burden the Canadian Corporation by appointment of a trustee". The motion for trustee was heard and decided in the bankruptcy court but was not appealed to the Ninth Circuit.

4. In his argument at page 12-13, Petitioner incorrectly implies that the question of jurisdiction over

Canadian assets was somehow critical to the lower courts' determinations regarding the appointment of a trustee and dismissal for bad faith. The opinion of the district court and the quotations from the bankruptcy court contained therein make it clear that the courts' decisions on the question of appointment of trustee were based upon factual evidence regarding bad faith and abuse. Each court found no factual justification for the appointment of a trustee. The question of the court's jurisdiction over Canadian assets was not decisive.

5. Finally, at pages 24-27 and again at page 35-36, Petitioner attempts to reargue the bankruptcy court's

approval of the rejection of the real estate contract. That issue is clearly not before the court. See Judge McNichol's opinion, Appendix pp 16-17. The decision of the bankruptcy court became final and unappealable on March 3, 1986. No appeal was perfected from that order and it is, therefore, the law of the case.

IX.

SUMMARY OF THE ARGUMENT

A. Petitioner purports to present three tightly drawn legal questions for the Court's consideration. However, this case is not the proper vehicle with which to raise either the legal questions listed or the factual questions argued. The question before the Ninth Circuit Court of Appeals was whether the

bankruptcy should have been dismissed for bad faith. The district court had examined the evidence before the bankruptcy court and refused to find error. The Ninth Circuit Court of Appeals reviewed the question again and determined that it had no jurisdiction to consider that issue. Since the initial decision was not a final appealable order, it was not properly in the Ninth Circuit Court of Appeals. Therefore, this Court should not accept jurisdiction to determine an appeal on that issue under 28 USC §1254.

B. The questions argued in the Petition were not presented to the lower courts. Although Petitioner did raise the question of jurisdiction over Canadian assets in the context of a Motion for Appointment of Trustee, the

court ultimately decided the motion on the basis of factual evidence before it regarding good faith, etc. Furthermore, even if the court's decision on the appointment of trustee or rejection of the contract involved questions regarding its jurisdiction over Canadian assets, Petitioner did not appeal either of those decisions.

The time for raising the issues Petitioner now tries to raise has passed. The bankruptcy court has determined the amount of Petitioner's claim and damages are fixed. Respondent has set aside sufficient money to pay those damages. It is appropriate that appellate proceedings should cease and this bankruptcy should be completed.

X.

ARGUMENT

1. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO HEAR AN APPEAL FROM THE BANKRUPTCY COURT'S ORDER DENYING A MOTION TO DISMISS.

The first order of business for the Court is that it must determine whether it has jurisdiction under 28 USC §1254. That issue turns on whether the case was properly "in" the court of appeals when the Petition for Certiorari was filed in this court. U.S. v. Nixon, 418 U.S. 683, 690, 41 L. Ed.2d 1039 94 Sup.Ct. 3090, (1974). The case was properly in the court of appeals only if the court of appeals had jurisdiction under 28 USC § 158(d). That section states: "the court of appeals shall have jurisdiction of

appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." The Ninth Circuit Court of Appeals correctly determined that:

> "the bankruptcy court's order denying Dunkleys motion to dismiss for bad faith filing is not a final order, and thus this court does not have jurisdiction over Dunkley's appeal of that portion of the district court's order which affirmed such denial." Appendix, Page 8.

The circuit court's decision is consistent with this Court's decisions in similar cases. In Lauro Lines s.r.l. v. Chasser, 490 U.S. _____, 109 Sup.Ct. 1974, 104 L. Ed.2d 548(1989), this Court determined that a denial of a motion to dismiss a damages action based upon a contractual forum selection clause was not a final order and therefore not appealable under 28 USC § 1291.

The Lauro case is but a recent example of this Court's long standing policy against deciding litigation in a piecemeal fashion. See, Cobbledick v. U.S., 309 U.S. 323, 324, 60 S.Ct. 540, 84 L.Ed. 783 (1940). "Finality as a condition of review is an historic characteristic of federal appellate procedure." Cited in Nixon at 690. In 1892, this Court construed its jurisdictional statute, the Judiciary Act of 1789,to limit appellate jurisdiction to "final judgments at law and final decrees in equity and admiralty." American Construction Co. v. Jacksonville Railway, 148 U.S. 372, 378, 37 S. Ct. 486 (1892).

The Court should apply these well established principles to this case. The bankruptcy action is very near to

conclusion. The damages for rejection of the contract have been determined and the decision regarding those damages has not been appealed to this Court. Respondents have placed more than sufficient money in the control of the court, to cover the damages assessed. This matter can and should be terminated.

2. THIS COURT SHOULD NOT CONSIDER ISSUES WHICH WERE NOT SQUARELY PRESENTED TO THE COURTS BELOW.

The Petition for Certiorari seems to present the Court with the intellectually interesting question of the U.S. Bankruptcy Court's jurisdiction over foreign assets. However, that issue is not presented by the case that is actually before the Court. The question

of the bankruptcy court's jurisdiction over Canadian assets arose briefly below in the context of arguments supporting and opposing the motion to appoint a trustee. The decision not to appoint a trustee was made on the basis of evidence regarding claims of improper management of Canadian assets, preferential treatment of Canadian creditors, and related matters. The bankruptcy judge's observations on those issues are quoted in Judge McNichols' opinion at Appendix pages 19 and 20. In a nutshell, the bankruptcy judge found no basis for finding mismanagement of assets and therefore refused to appoint a trustee.

The refusal to appoint a trustee was not appealed to the Ninth Circuit Court of Appeals. Petitioner specifically stated in his Appellant's Brief before

the Ninth Circuit: "part [of the order appealed from] denied was for the appointment of a trustee. The Dunkleys do not appeal from that decision." Appellants Brief Page 1.

Only two issues were presented to the Ninth Circuit Court of Appeals by petitioners. These were the choice of the measure of damages applied after the rejection of the real estate contract and the refusal to dismiss the bankruptcy for bad faith. The appellate court upheld the bankruptcy court's decision on the measure of damages and determined that it did not have jurisdiction under 28 USC § 158(d) to hear the appeal from the decision on the motion to dismiss.

Petitioners have not appealed the ruling on the measure of damages, nor have they appealed the decision on

jurisdiction. It would be improper for this Court to review findings of fact or conclusions of law regarding the motion to appoint a trustee where the appellant had not raised those issues before the circuit court of appeals. See McCullough v. Kammerer Corp., 323 U.S., 327, 328. 65 S.Ct. 297, 89 L.Ed. 273, (1945).

Similarly, Petitioner's arguments regarding the appropriateness of rejection of the contract were not presented to the appellate court below. The decision of the bankruptcy court on rejection was not appealed. As Judge McNichols stated in his opinion "the Order authorizing such rejection was not appealed and the efficacy of that Order is not before this court." (Appendix pages 16-17). Furthermore that issue was not presented to the Ninth Circuit Court

of Appeals. Under the McCollough rationale, the Supreme Court should refuse to consider that issue as well.

Equally inappropriate would be a reconsideration of the evidence regarding petitioner's bad faith allegations. Although he did not list the issue as a question for review, Petitioner has devoted a substantial portion of his brief to the reargument of his claims of bad faith. An example is Petitioner's statement at page 27: "The facts of this case clearly show that dismissal for lack of good faith is an appropriate sanction."

Petitioner is attempting to get this Court to review the facts as presented in evidentiary hearings before the bankruptcy court and to reach a different conclusion than the trial judge. This is

contrary to the Court's often expressed policy against reviewing factual questions. See, e.g. Goodwin v. Lukens Steel Co., 482 US 656, 665, 107 S.Ct. 2617, 96 L.Ed. 2d, 572 (1987), and see U.S. v. Johnston, "we cannot grant certiorari to review evidence and discuss specific facts." 268 U.S. 220, 227, 45 S. Ct. 496, 69 L.Ed 925 (1924).

It is well established that a court's finding as to good faith in the context of a bankruptcy is a factual determination that cannot be set aside unless it is clearly erroneous. In Re Northeast Corporation, 519 F.2d 1360, 1363 (1975).

This Court, should not accept Petitioner's invitation to delve into the findings. The Petitioner has not properly set out the findings with which

he disagrees nor has he candidly stated to the Court that he proposes a review of the evidence. Furthermore, because of its decision on its own jurisdiction, the Ninth Circuit Court of Appeals never considered or ruled upon the factual issues raised in that court. If ever there was a case where the Court should refuse to examine the evidence for correction of errors, this is such a case. Under either of the McCollough or the Goodman rationale, the Court should refuse certiorari.

XI.

CONCLUSION

Petitioner has presented no good reason for this Court to grant the Writ of Certiorari. Petitioner has shown no conflict among the circuits, no question of wide impact under the Constitution, no

reason to exercise supervisory power over lower courts. Petitioner has attempted to package his appeal as an intellectually interesting problem. In fact, however, all that this case presents is a factual dispute between litigants in a single bankruptcy proceeding.

The amount in dispute here has been determined by the bankruptcy court and the propriety of the measure of damages was affirmed by the Ninth Circuit Court of Appeals. That amount of Petitioner's claim as determined by the bankruptcy court is $4,969.00 which, together with pre-petition attorney fees, $6,361.40, places the total amount in controversy at $11,330. Respondent has funds available and set aside to pay that amount.

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

DATED this 28th day of August, 1990.

Respectfully submitted,

Robert J. McKanna